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**FOOLS RUSH IN WHERE LAWYERS WOULD BETTER
TREAD: THE RIGHT TO SELF-REPRESENTATION AND
RELATED STANDARDS OF COMPETENCY**

COURT OF APPEALS OF NEW YORK

The People of the State of New York v. Alias Stone¹
(decided February 13, 2014)

I. INTRODUCTION

An old proverb states that “every man who is his own lawyer, has a fool for a client.”² Despite these words of wisdom, the Supreme Court of the United States “bestow[ed] a *constitutional* right on one to make a fool of himself” in *Faretta v. California*³ when it identified the right to self-representation implicit in the Sixth Amendment.⁴

The Sixth Amendment to the United States Constitution provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁵ A criminal defendant’s ability to waive his Sixth Amendment right to counsel and proceed pro se was first recognized in *Faretta*, which has since precipitated numerous concerns regarding the competing interests of a defendant’s right to counsel versus his freedom to waive that same right and act as his own counsel. Presumably, the average defendant

¹ 6 N.E.3d 572 (N.Y. 2014).

² Often incorrectly attributed to President Abraham Lincoln, this quote was first published in an 1825 collection of “witty quotes,” and it appears in the following context. HENRY KETT, *THE FLOWERS OF WIT* 115 (Hartford, Oliver D. Cooke & Co. 1825). A layperson mentioned to a lawyer that a particular book of medicine qualified anyone to be his own physician. *Id.* The lawyer responded, “How far that may be the case . . . , I will not presume to determine; but I may be allowed to speak decidedly as to my own profession; and so I hesitate not to pronounce, that every man who is his own lawyer, has a fool for a client.” *Id.*

³ 422 U.S. 806 (1975).

⁴ *Id.* at 852 (Blackmun, J., dissenting) (emphasis in original).

⁵ U.S. CONST. amend. VI.

is unlikely to provide himself with as effective a defense as an experienced attorney, and disallowing self-representation would further the interest of providing a fair trial.⁶ At the same time, a defendant should have the freedom to make his own choices, and it likewise seems unfair to force an attorney upon him against his will.⁷ Justice Blackmun foresaw serious problems with the right to self-representation in his dissent to the very same decision that established the right, stating that “[many of the] procedural problems spawned by [the *Faretta* decision], such as the standards of waiver and the treatment of the pro se defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.”⁸ The struggle between these interests has resulted in courts placing limitations on self-representation in order to balance all the constitutional concerns at stake. Still, many of these boundaries remain unclear, and it appears that Justice Blackmun’s premonitory words have become a reality.

This note will examine a recent case before the New York Court of Appeals, *People v. Stone*,⁹ which considered the issue of whether a trial court was constitutionally required to sua sponte assess a defendant’s mental capacity when he requested to represent himself. The Court of Appeals characterized *Stone* as a case that contemplated the intersection of several constitutional rights—namely, the due process requirement that a criminal defendant be competent to stand trial, as well as the Sixth Amendment right to counsel and the corresponding right to proceed pro se.¹⁰ This note will expand upon these broader constitutional concerns, both federally and in New York, as they relate to the more specific question regarding mental competency presented in *Stone*. Part II will outline the relevant facts and court discussion in *Stone*. Part III will provide a constitutional framework by defining the rights to counsel and self-representation generally. The competency limitations imposed on self-representation by the federal and New York courts will be examined in Parts IV and V, respectively. Part VI will analyze the various standards of mental competency that courts have articulated, identify the inconsistencies, and ultimately argue that the New York approach

⁶ See discussion *infra* Part III.A.

⁷ See discussion *infra* Part III.B.

⁸ *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting).

⁹ 6 N.E.3d 572 (N.Y. 2014).

¹⁰ *Id.* at 574-75.

is more workable than the federal approach. Finally, Part VII will revisit *People v. Stone*, and Part VIII will conclude with a brief summary.

II. THE PEOPLE OF THE STATE OF NEW YORK V. ALIAS STONE

The New York Court of Appeals recently held in *People v. Stone* that a trial court was not constitutionally obligated, under either federal or New York law, to order a competency hearing sua sponte prior to granting a criminal defendant's request to proceed pro se, where the trial court had no reason to question the defendant's mental competency.

A. Factual and Procedural Background

Alias Stone was tried on two counts of burglary in the New York County Supreme Court after he trespassed into secure areas of a hotel and stole a cell phone.¹¹ At trial, Stone indicated that he did not trust his lawyer or the criminal justice system, so he requested to proceed pro se.¹² The trial court repeatedly warned Stone that it was unwise to proceed on his own and attempted to persuade him to continue with assigned counsel.¹³ Nevertheless, Stone insisted that his "paranoia" and lack of faith in the legal system led to his firm wish to represent himself and do "the best [he could] on his own."¹⁴ Stone's appointed counsel also tried to discuss the matter with him, but ultimately even he agreed that Stone should proceed pro se since there was no convincing him otherwise.¹⁵ Aside from this deep distrust of the "system," Stone otherwise appeared mentally sound.¹⁶ The court granted Stone's request, believing him to be intelligent despite his lack of legal training, but directed that his original attorney remain available as stand-by counsel.¹⁷ After a short period of self-representation, Stone became "nervous" and asked stand-by counsel to step in.¹⁸ At no point during trial did Stone or his assigned counsel

¹¹ *Id.* at 573.

¹² *Id.*

¹³ *Id.*

¹⁴ *Stone*, 6 N.E.3d at 573.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *Id.*

raise any issue of Stone's mental capacity.¹⁹

Stone was convicted at trial of two counts of burglary.²⁰ Two months after trial, defense counsel hired a social worker to evaluate Stone "for sentencing purposes."²¹ After concluding her evaluation, the social worker advised the court that Stone may have undiagnosed mental problems.²² The prosecution then informed the court that Stone's family had also noticed he had developed mental issues.²³ The court ordered an examination pursuant to New York Criminal Procedure Law section 730.30,²⁴ which requires mental examination of a defendant where the court believes he may be incapacitated and unable to comprehend the proceedings against him.²⁵ The psychiatric evaluations confirmed that Stone had developed mental health issues, including hallucinations, delusions, and possible psychotic or depressive disorder.²⁶ In January 2010, the hearing court found Stone unfit to proceed with sentencing.²⁷ Stone thereafter underwent medical treatment, and in April 2010, the trial court found that he had "recovered his competency" and could be sentenced.²⁸

Stone appeared for his sentencing in May 2010.²⁹ The prosecution listed his extensive history of theft offenses, while defense counsel focused on Stone's abusive childhood and stressed that his previous offenses were nonviolent.³⁰ Stone then gave a personal statement where he spoke out against the criminal justice system, described his lifetime of imprisonment, and asserted that he "never received help transitioning to civilian life."³¹ Ultimately, the court sentenced Stone to seven years in prison with five years post-release

¹⁹ *Stone*, 6 N.E.3d at 574, 577.

²⁰ *Id.* at 573.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 573-74.

²⁴ *Stone*, 6 N.E.3d at 574.

²⁵ N.Y. CRIM. PROC. LAW § 730.30(1) (McKinney 2011) ("At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person."); *see also* discussion *infra* Part V.B.1.

²⁶ *Stone*, 6 N.E.3d at 574.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Stone*, 6 N.E.3d at 574.

supervision with the terms to run concurrently.³²

Stone appealed his conviction to the First Department of the New York State Supreme Court's Appellate Division, alleging that the trial court violated his Sixth Amendment right to counsel when it failed to examine his mental capacity before allowing him to represent himself.³³ Stone urged that numerous "red flags" arose before, during, and after trial, all of which should have alerted the court to his lack of competency.³⁴ Additionally, Stone argued that the U.S. Supreme Court decision in *Indiana v. Edwards*³⁵ established a minimum competency standard to stand trial and a heightened standard to represent oneself, so the trial court should have ordered a hearing to examine Stone's capacity to proceed pro se.³⁶ The First Department rejected Stone's argument and affirmed the trial court decision.³⁷ Stone appealed to the New York Court of Appeals.³⁸

B. Court of Appeals Discussion of *Stone*

Affirming the First Department's decision, the Court of Appeals led its discussion by noting the implication in *Stone* of two constitutional imperatives: (1) the due process requirement that a defendant be competent to stand trial before proceeding³⁹ and (2) the Sixth Amendment right to self-representation, coupled with the "corresponding" right to competent counsel.⁴⁰ New York's standard for competency to stand trial has been codified in Criminal Procedure Law section 730.10(1),⁴¹ which is consistent with the federal standard articulated by the U.S. Supreme Court in *Dusky v. United States*.⁴²

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 577.

³⁵ 554 U.S. 164 (2008).

³⁶ *Stone*, 6 N.E.3d at 574.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 574-75.

⁴⁰ *Id.* at 575.

⁴¹ N.Y. CRIM. PROC. LAW § 730.10(1) (McKinney 2011) (" 'Incapacitated person' means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense. ").

⁴² 362 U.S. 402, 402 (1960) ("[T]he test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.") (internal quotations omitted).

Both require that the defendant be able to understand the proceedings against him and assist in his own defense.⁴³ In New York, the State must prove the defendant's competency according to the statutory standard only where there is some indication that his mental capacity is questionable; otherwise, the defendant is presumed to be competent.⁴⁴ Likewise, a pro se application in New York should be granted only if the defendant "effectuates a knowing, voluntary and intelligent waiver of the right to counsel."⁴⁵ The trial court must make a "searching inquiry" into the defendant's understanding of his decision to refuse counsel.⁴⁶

The Court of Appeals then discussed two cases in depth before distinguishing both from the case at bar: *Indiana v. Edwards* and *People v. Reason*,⁴⁷ decided by the U.S. Supreme Court and the New York Court of Appeals, respectively. In *Edwards*, the trial court conducted several competency hearings before finding that the defendant, a delusional schizophrenic, was competent to stand trial, yet his mental illness rendered him incompetent to proceed pro se.⁴⁸ The Supreme Court affirmed, ruling that states are constitutionally permitted to find a mentally ill defendant competent to stand trial but incompetent to represent himself.⁴⁹ The Court reasoned that since mental illness can vary in degree, in manner, and over time, a defendant's competence to make decisions and carry out different tasks may likewise vary.⁵⁰ In *Stone*, the Court of Appeals rejected Stone's assertion that *Edwards* established a baseline competency standard for a defendant to stand trial and a heightened standard to proceed pro se.⁵¹ The court further disagreed with Stone's interpretation of *Edwards* that a competency hearing is always required before a defendant can represent himself.⁵² In support of both of these rulings, the Court of Appeals emphasized how *Edwards* merely established that a trial court *may* constitutionally deny a defendant the right to self-representation based on mental illness and lack of competency; this

⁴³ See *supra* notes 41, 42.

⁴⁴ *Stone*, 6 N.E.3d at 575.

⁴⁵ *Id.* at 575.

⁴⁶ *Id.*

⁴⁷ 334 N.E.2d 572 (N.Y. 1975).

⁴⁸ *Stone*, 6 N.E.3d at 575.

⁴⁹ *Id.* at 575-76.

⁵⁰ *Id.* at 576.

⁵¹ *Id.*

⁵² *Id.*

holding from *Edwards* does not, however, *compel* a trial court to do so.⁵³

The Court of Appeals then cited its decision in *People v. Reason*,⁵⁴ where it likewise recognized that a mentally ill defendant may possess varying capacities to complete different tasks. The trial court in *Reason* had ordered an examination of the defendant's competency to stand trial prior to granting his pro se request.⁵⁵ When the defendant insisted that he should have received a hearing on his competency to proceed pro se, in addition to the hearing on his competency to stand trial, the Court of Appeals refused to draw a bright line between levels of mental capacity with respect to these two issues.⁵⁶ Mental capacity is merely a factor to be considered in determining a valid waiver of the right to counsel; there is "[no] distinct competency inquiry."⁵⁷ Unless there is reason to question the defendant's mental capacity, a formal hearing is not a precondition for a court's adjudication of a pro se request.⁵⁸

The Court of Appeals construed the *Stone* case as "significantly different" from both *Edwards* and *Reason*.⁵⁹ In the latter two cases, the trial court was on notice of the defendant's mental illness both before and during trial, in turn leading to the competency hearings; in *Stone*, by contrast, the defendant's mental issues did not arise until after the completion of trial, and the court otherwise had "no reason to question his mental health" at the time of his pro se request.⁶⁰ The court rejected *Stone*'s examples of noticeable mental instability—namely, his distrust of the legal system, his "paranoia" and dissatisfaction with his attorney, as well as his occasional "obstreperous conduct" and "emotional outbursts."⁶¹ This behavior is not uncommon among criminal defendants and was not substantial enough to suggest mental illness and require a formal competency evaluation.⁶²

⁵³ *Stone*, 6 N.E.3d at 576.

⁵⁴ 334 N.E.2d at 573.

⁵⁵ *Id.*

⁵⁶ *Id.* at 574.

⁵⁷ *Stone*, 6 N.E.3d at 576 (internal quotations omitted).

⁵⁸ *Id.*

⁵⁹ *Id.* at 577.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Stone*, 6 N.E.3d at 577-78.

III. CONSTITUTIONAL FRAMEWORK: DEFINING THE RIGHTS TO ASSISTANCE OF COUNSEL AND SELF-REPRESENTATION

The following section will broadly outline the rights to assistance of counsel and self-representation before considering the limitations courts have placed on the latter in an effort to preserve the integrity of the former. As a fundamental right expressly provided for in the Bill of Rights, the Sixth Amendment right to assistance of counsel has been recognized since its inception as a necessary component of due process and a fair trial.⁶³ Thus, when the Supreme Court established the implied Sixth Amendment right to self-representation nearly 200 years later in *Faretta v. California*,⁶⁴ the dissenting Justices expressed concern as to how this right would be fairly applied without compromising the right to counsel.⁶⁵ It is important to understand the interests underlying these countervailing rights in order to appreciate the consequential limitations that courts have placed on self-representation.

A. The Right to Assistance of Counsel

The Sixth Amendment explicitly confers upon United States citizens the right to “have the Assistance of Counsel for [their] de-

⁶³ *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (describing the right to counsel as “necessary to insure fundamental human rights of life and liberty”); *Powell v. Alabama*, 287 U.S. 45, 52, 67-69 (1932) (characterizing the right to counsel as a “necessary incident of a fair trial,” as well as a “fundamental principle[] of liberty and justice which lie[s] at the base of all our civil and political institutions,” and expounding that a refusal of the right to counsel would amount to “a denial of . . . due process in the constitutional sense”).

⁶⁴ Although the Supreme Court in *Faretta* insisted that the right to self-representation has been “protected by statute since the beginnings of our Nation,” 422 U.S. at 812, both dissenting Justices argued that despite this statutory history, the Framers’ omission of the right in the Sixth Amendment is evidence that it was *not* intended as a constitutional right, *id.* at 844 (Burger, J., dissenting); *id.* at 850 (Blackmun, J., dissenting). Thus, *Faretta* was the first Supreme Court case to unambiguously declare self-representation as a constitutional right.

⁶⁵ *Faretta*, 422 U.S. at 840 (Burger, J., dissenting) (“[B]oth the spirit and the logic of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel . . .”; and “there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges.”); *id.* at 849, 852 (Blackmun, J., dissenting) (finding no basis for the right to self-representation in the Sixth Amendment, viewing the right as one that ignores “the established principle” that the State’s interest in a criminal prosecution is not to win but to serve justice and determine the ultimate truth, and expressing concern with the procedural problems that will result from this right).

fence [in criminal prosecutions].”⁶⁶ The Supreme Court has emphasized the vulnerability of an unrepresented defendant, who—regardless of his intelligence—lacks knowledge of the intricacies of the law, familiarity with the rules of evidence, and the skills required to prepare his own defense.⁶⁷ To ensure that a defendant’s ignorance does not result in an unfair conviction, he is entitled to representation by an attorney whose legal training should provide him with the best defense possible.⁶⁸ It would be an undue deprivation not only of his rights to due process and a fair trial, but also his basic human rights, to allow a defendant to proceed to trial without proper representation.⁶⁹ The right to counsel is so essential that it has been deemed applicable to the States through the Fourteenth Amendment’s Due Process Clause.⁷⁰ Notwithstanding its obligation to comport with the Fourteenth Amendment of the U.S. Constitution, New York State also provides its defendants with the right to counsel: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel”⁷¹ Like the Supreme Court, New York courts have expressed similar sentiments about the fundamental nature of this right in light of a defendant’s inherent inability to provide a strong defense without experienced counsel.⁷²

B. The Right to Self-Representation

The Supreme Court declared in *Faretta v. California* that along with a defendant’s right to counsel exists a converse constitutional right to refuse counsel and proceed pro se.⁷³ In *Faretta*, the defendant was criminally convicted after the trial court denied his application to proceed pro se, reasoning that he had no constitutional

⁶⁶ U.S. CONST. amend. VI.

⁶⁷ *Faretta*, 422 U.S. at 834; *Johnson*, 304 U.S. at 462-63, 465; *Powell*, 287 U.S. at 69.

⁶⁸ *Johnson*, 304 U.S. at 465; *Powell*, 287 U.S. at 68-69; see also *supra* note 65.

⁶⁹ See *supra* note 63.

⁷⁰ *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963); *Powell*, 287 U.S. at 67.

⁷¹ N.Y. CONST. art. I, § 6.

⁷² See *People v. Rosen*, 613 N.E.2d 946, 949 (N.Y. 1993) (“A defendant lacking legal training and courtroom experience may be at a decided disadvantage in carrying out the complex task of presenting a defense.”); *People v. McIntyre*, 324 N.E.2d 322, 325 (N.Y. 1974) (acknowledging the strong societal interest that criminal trials determine the “truth or falsity of the charges in a manner consistent with fundamental fairness,” which is unlikely to occur if a defendant represents himself).

⁷³ *Faretta*, 422 U.S. at 807.

right to self-representation.⁷⁴ The Supreme Court disagreed,⁷⁵ engaging in an extensive discussion about the historical bases, in both statutory and case law, that necessarily imply a Sixth Amendment right to self-representation.⁷⁶ Because the Sixth Amendment “personally” and “directly” grants defendants various rights to assist in their own defense, it follows that they are also entitled to conduct their own defense pro se, should they choose to do so.⁷⁷ The purpose of the Sixth Amendment is to provide defendants with the tools to defend themselves, and “[t]o thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.”⁷⁸ Additionally, early American and English legal history both show that self-representation was once not only customary, but it was the default form of representation.⁷⁹

The Supreme Court also cited its own precedent in support of its holding in *Faretta*. Both *Snyder v. Massachusetts*⁸⁰ and *Price v. Johnston*⁸¹ had previously contemplated, in dicta, the possibility of a defendant conducting his own defense.⁸² Further, in *Adams v. United States ex rel. McCann*,⁸³ the Court held that a defendant may exercise his “free and intelligent choice” to waive his constitutional right to counsel; hence, “the Constitution does not force a lawyer upon a defendant.”⁸⁴ Though this declaration from *Adams* proved helpful to the *Faretta* analysis, the Supreme Court noted that a different issue was presented in *Faretta*—specifically, “[w]hether the Constitution forbids a State from forcing a lawyer upon a defendant.”⁸⁵ In other words, it was already well-established that a defendant may choose to proceed without counsel, assuming that the trial court has no qualms

⁷⁴ *Id.* at 810-11.

⁷⁵ *Id.* at 836.

⁷⁶ *Id.* at 817.

⁷⁷ *Id.* at 819-20.

⁷⁸ *Faretta*, 422 U.S. at 820.

⁷⁹ *Id.* at 823.

⁸⁰ 291 U.S. 97 (1934), *overruled in part on other grounds by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁸¹ 334 U.S. 266 (1948), *abrogated on other grounds by* *McCleskey v. Zant*, 499 U.S. 467 (1991).

⁸² *Faretta*, 422 U.S. at 816.

⁸³ 317 U.S. 269 (1942).

⁸⁴ *Faretta*, 422 U.S. at 814-15 (quoting *Adams*, 317 U.S. at 279). The Supreme Court in *Adams* also noted that “a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so.” *Adams*, 317 U.S. at 278.

⁸⁵ *Faretta*, 422 U.S. at 815.

with this choice. What was unsettled until *Faretta*, however, was whether a trial court could *force* a defendant to accept counsel against his will. The majority in *Faretta* answered this question in the negative.⁸⁶

The *Faretta* Court emphasized the importance of a defendant's autonomy and freedom to make his own choices, even if they result in "his own detriment."⁸⁷ The Court acknowledged that there are credible arguments against recognizing a right to self-representation, such as the value of a lawyer's role in assuring a fair trial for a criminal defendant.⁸⁸ However, "it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want."⁸⁹ As important as the right to counsel may be, free choice is likewise an invaluable, fundamental right.⁹⁰ In most cases, a defendant is obviously better off with counsel; yet, if the defendant is unwilling to accept his counsel's assistance, "the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly."⁹¹ Furthermore, it is not "inconceivable" that a defendant may present a better defense than would his counsel.⁹² In sum, the Court came to a "nearly universal conviction" that, assuming a defendant validly waives his right to counsel, "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself"⁹³

While federal law identifies self-representation as an implied right, the New York Constitution expressly confers this right on its citizens: "In any trial in any court whatever the party accused shall be allowed to appear and defend *in person* and with counsel"⁹⁴ Likewise, three separate sections of the New York Criminal Procedure Law provide that if a defendant seeks to proceed without counsel, "the court must permit him to do so [if] it is satisfied that he made such decision with knowledge of the significance thereof"

⁸⁶ *Id.* at 807.

⁸⁷ *Id.* at 834.

⁸⁸ *Id.* at 832-33.

⁸⁹ *Id.* at 833.

⁹⁰ *Faretta*, 422 U.S. at 833-34.

⁹¹ *Id.* at 834.

⁹² *Id.*

⁹³ *Id.* at 817.

⁹⁴ N.Y. CONST. art. I, § 6 (emphasis added).

.⁹⁵ New York case law has upheld this right, but it has also revealed that, much like federal law, the boundaries of self-representation “remain largely undefined.”⁹⁶ These unclear boundaries are a result of New York’s difficulty in balancing what it recognizes as two equally important but competing interests: a defendant’s autonomy to make free choices versus his fair trial right to an effective defense.⁹⁷

IV. FEDERAL LIMITATIONS ON THE RIGHT TO SELF-REPRESENTATION

The federal right to self-representation is not absolute.⁹⁸ Though a defendant’s autonomy and volition deserve great respect, the competing interest of his fair trial right to an effective defense requires certain conditions to be met before allowing a defendant to represent himself.⁹⁹ First, the defendant must be competent to stand trial.¹⁰⁰ Of course, if a defendant lacks the mental capacity to stand trial, then his inability to stand trial will render his self-representation a non-issue; nonetheless, the Supreme Court has indicated that this is

⁹⁵ N.Y. CRIM. PROC. LAW § 170.10(6) (McKinney 2007); *Id.* at § 180.10(5); *Id.* at § 210.15(5).

⁹⁶ *McIntyre*, 324 N.E.2d at 326.

⁹⁷ *See Stone*, 6 N.E.3d at 575 (characterizing the rights to counsel and self-representation as “corresponding—and sometimes competing” interests); *People v. Arroyo*, 772 N.E.2d 1154, 1155-56 (N.Y. 2002) (describing the right to counsel and the right to forego counsel as “inherently antagonistic ideals,” so in order to best serve the interests of justice and fundamental fairness, the right to self-representation must be qualified); *Rosen*, 613 N.E.2d at 949 (noting that the right to self-representation exists partly “to affirm the dignity and autonomy of the accused,” but also acknowledging that a defendant who is legally inexperienced may be disadvantaged “in carrying out the complex task of presenting a defense”); *McIntyre*, 324 N.E.2d at 325 (emphasizing an individual’s right to “determine his own destiny,” which is embodied in the right to self-representation, as well as the “countervailing interest of society” that the criminal justice system is supposed to determine the “truth or falsity of the charges in a manner consistent with fundamental fairness”).

⁹⁸ *Edwards*, 554 U.S. at 171.

⁹⁹ Because this note focuses on the self-representation limitations related to mental competency, other limitations on the exercise of the right are not relevant to this discussion; however, for the sake of comprehensiveness, they will be briefly addressed. In a footnote, the Supreme Court in *Faretta v. California* remarked that a state may (1) terminate the right to self-representation of a defendant who “deliberately engages in serious and obstructionist misconduct” and (2) insist upon “standby counsel” to assist and be available if the defendant needs help or forfeits his self-representation right. 422 U.S. at 834 n.46. Some other restrictions may include a timely request to proceed pro se, as well as a clear and unequivocal communication of the request. Tiffany Frigenti, Note, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn* – *People v. Smith*, 28 TOURO L. REV. 1019, 1032-33 (2013).

¹⁰⁰ *See discussion infra* Part IV.A.

a prerequisite to exercising the right to self-representation.¹⁰¹ Second, the court must find that the defendant waived his right to counsel competently, knowingly, and voluntarily.¹⁰² Third, the defendant must also be competent to conduct his own defense, as distinguished from his competence to *choose* self-representation.¹⁰³ The Supreme Court has attempted to define the levels of competency a defendant must exhibit to satisfy each of these requirements; however, the nuances between the standards are difficult to discern, and courts struggle to apply them appropriately without compromising the integrity of the constitutional rights they are intended to protect.

A. Competency to Stand Trial

This subsection will summarize federal case law governing competency to stand trial, which must be established both to effect a valid waiver of counsel and to exercise the right to self-representation,¹⁰⁴ and which has been used by the Supreme Court as a starting point in articulating other related standards of competency.¹⁰⁵

Due process requires that criminal defendants be mentally competent to stand trial before they can be prosecuted without offending the Constitution.¹⁰⁶ In a short, two-paragraph opinion, the Supreme Court in *Dusky v. United States*¹⁰⁷ created a two-part test that established the minimum standard of competency required by the Constitution. First, the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”¹⁰⁸ Second, the defendant must have a “rational as well as factual understanding of the proceedings against him.”¹⁰⁹

¹⁰¹ See *infra* note 104 and accompanying text.

¹⁰² See discussion *infra* Part IV.B.

¹⁰³ See discussion *infra* Part IV.C.

¹⁰⁴ *Godinez v. Moran*, 509 U.S. 389, 409 (1993) (Blackmun, J., dissenting) (“Today, the majority holds that [the] standard of competence [to stand trial] is constitutionally adequate to assess a defendant’s competence to waive the right to counsel and represent himself.”); see also *id.* at 400 (majority opinion). The *Godinez* majority explained that a defendant must be competent to stand trial before he can waive his right to counsel. *Id.* Since waiver of the right to counsel is a prerequisite to self-representation, it follows that competency to stand trial must also be satisfied before a defendant can exercise his right to represent himself.

¹⁰⁵ See discussion *infra* Parts IV.B, IV.C.

¹⁰⁶ *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

¹⁰⁷ 362 U.S. 402 (1960).

¹⁰⁸ *Id.* at 402.

¹⁰⁹ *Id.*

Subsequent Supreme Court decisions have elaborated on this test by articulating factors to consider for satisfying the *Dusky* competence standard. In *Pate v. Robinson*,¹¹⁰ the Court suggested that trial courts look into the defendant's (1) "history of pronounced irrational behavior," (2) "demeanor at trial," and (3) prior psychiatric history, if any.¹¹¹ None of these factors is dispositive.¹¹² *Drope v. Missouri*¹¹³ examined the same three competency factors even further, explaining that trial courts should evaluate the factors collectively since there are "no fixed or immutable signs" that will necessarily indicate competence.¹¹⁴ Furthermore, competence is an ever-changing state, so courts should "be alert" to indications of change in a defendant's mental capabilities.¹¹⁵

B. Waiver of the Right to Assistance of Counsel

A valid waiver of the right to counsel is another prerequisite to a defendant being permitted to represent himself.¹¹⁶ Much like the rationale behind the right to self-representation, a defendant's right to refuse counsel is an extension of his individual liberty to make free choices.¹¹⁷ By definition, a waiver is an "intentional relinquishment or abandonment of a known right or privilege."¹¹⁸ Thus, a waiver will not be valid unless it is provided competently, knowingly, and voluntarily.¹¹⁹ The Supreme Court in *Godinez v. Moran*¹²⁰ characterized this as a two-part inquiry, where (1) the competence inquiry focuses on whether the defendant has the mental capacity and "ability to understand the proceedings," and (2) the knowing and voluntary inquiry questions whether the defendant "actually *does* understand the significance and consequences of a particular decision," and whether the decision is made willingly and is "uncoerced."¹²¹ The

¹¹⁰ 383 U.S. 375 (1966).

¹¹¹ *Id.* at 386.

¹¹² *Id.*; *Drope*, 420 U.S. at 180.

¹¹³ 420 U.S. 162, 180 (1975).

¹¹⁴ *Id.* at 180.

¹¹⁵ *Id.* at 181.

¹¹⁶ *Faretta*, 422 U.S. at 835.

¹¹⁷ *Adams*, 317 U.S. at 275.

¹¹⁸ *Johnson*, 304 U.S. at 464.

¹¹⁹ *Godinez*, 509 U.S. at 401-02; *Faretta*, 422 U.S. at 835; *Brady v. United States*, 397 U.S. 742, 748 (1970); *Adams*, 317 U.S. at 275, 279; *Johnson*, 304 U.S. at 464, 468.

¹²⁰ 509 U.S. 389 (1993).

¹²¹ *Id.* at 401 n.12 (emphases in original).

defendant need not have “the skill and experience of a lawyer” in order to waive the right to counsel knowingly and intelligently,¹²² but he should be informed of, and be able to appreciate, the risks and consequences involved.¹²³ Trial courts should engage in a fact-specific analysis in each case by investigating areas such as the defendant’s “background, experience, and conduct.”¹²⁴ Courts must “indulge every reasonable presumption against waiver” of the right to counsel and be certain that a defendant has provided a valid waiver before depriving him of this constitutional right.¹²⁵

The Court in *Godinez* determined that the standard of competence for waiver of counsel is no higher than the standard of competence to stand trial, stressing the distinction between the competence to *waive the right* to counsel versus the competence to actually proceed without counsel and conduct one’s own trial defense.¹²⁶ It is therefore sufficient, where the defendant seeks to waive his right to counsel, that he satisfy the same competency standard articulated in *Dusky*.¹²⁷ By contrast, the standard of competency to proceed pro se may be higher than the *Dusky* standard, as discussed below.

C. COMPETENCY TO PROCEED PRO SE

Separate and distinct from the self-representation prerequisite that a defendant provide a competent waiver of the right to counsel is the additional requirement that he be competent to conduct his own defense. In *Indiana v. Edwards*, the Supreme Court held that a trial court can constitutionally deny a defendant’s self-representation request based on a finding that, while he may satisfy the minimum level of competency to stand trial as articulated in *Dusky*, he may nevertheless fall into a “gray area” of mental competency where he is unable to conduct his own defense due to mental illness.¹²⁸ The defendant in *Edwards* had a history of mental problems, including delusions and schizophrenia, so the court subjected him to several competency hearings before deeming him fit to stand trial.¹²⁹ The trial court

¹²² *Faretta*, 422 U.S. at 835.

¹²³ *Id.*; *Brady*, 397 U.S. at 748.

¹²⁴ *Johnson*, 304 U.S. at 464.

¹²⁵ *Carnley v. Cochran*, 369 U.S. 506, 514, 516 (1962); *Johnson*, 304 U.S. at 464.

¹²⁶ *Godinez*, 509 U.S. at 399.

¹²⁷ See discussion *supra* Part IV.A.

¹²⁸ *Edwards*, 554 U.S. at 173-76.

¹²⁹ *Id.* at 167-69.

refused his subsequent pro se request, observing that although he was competent to stand trial, his mental illness limited his ability to conduct his own defense.¹³⁰ After he was convicted, the defendant appealed, asserting a violation of his constitutional right to self-representation.¹³¹ The matter reached the Indiana Supreme Court, which held that the State was required to allow the defendant to proceed pro se, but then asked the U.S. Supreme Court to consider the issue.¹³²

The U.S. Supreme Court in *Edwards* noted that its opinion in *Godinez* was a helpful starting point, but it did not resolve the issue at hand.¹³³ In *Godinez*, the defendant sought to waive his right to counsel, proceed on his own, and merely enter a guilty plea; in *Edwards*, on the other hand, the defendant sought to waive his right to counsel, proceed on his own, and conduct his own trial proceedings.¹³⁴ Thus, the issue in *Godinez* was the defendant's competence to waive the right to counsel, whereas the issue in *Edwards* was his competence to conduct his own defense.¹³⁵ Also, in *Godinez*, the Supreme Court merely held that a State may "permit a gray-area defendant to represent himself," while the issue in *Edwards* was whether a State may "deny a gray-area defendant the right to represent himself."¹³⁶

In reaching its conclusion, the *Edwards* Court emphasized how mental illness can vary in degree over time and manifest itself in different ways.¹³⁷ As a result, while a defendant's mental abilities may allow him to minimally appreciate the proceedings and constitutionally be subjected to trial, he may fall into a "gray area" where his mental abilities do not allow him to "carry out the basic tasks" necessary to conduct his own trial defense.¹³⁸ Moreover, the purposes of promoting a defendant's "dignity" and "autonomy," which underlie the right to self-representation, are not served in cases where the defendant is not mentally capable of conducting his own defense.¹³⁹ The Court concluded that trial courts must be able to take into ac-

¹³⁰ *Id.* at 169.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Edwards*, 554 U.S. at 172-73.

¹³⁴ *Id.* at 173.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 175-76.

¹³⁸ *Edwards*, 554 U.S. at 175-76.

¹³⁹ *Id.* at 176.

count the varying degrees of mental capacity that a defendant may exhibit and use their best judgment to determine whether the defendant can stand trial, proceed pro se, or both.¹⁴⁰

V. NEW YORK LIMITATIONS ON THE RIGHT TO SELF-REPRESENTATION

The following section will describe the limitations on self-representation in New York and identify the major differences between federal and New York law.¹⁴¹ According to U.S. Supreme Court precedent, a defendant seeking to proceed pro se must first demonstrate (1) competency to stand trial, (2) competency to waive the right to counsel, as well as a knowing and voluntary waiver, and (3) competency to proceed pro se.¹⁴² By contrast, New York only partially recognizes the foregoing conditions on self-representation—specifically, competency to stand trial and a knowing and voluntary waiver. New York does not separately consider competency to waive counsel or competency to proceed pro se; rather, trial courts have discretion to consider a defendant’s overall mental capability as a factor in determining a valid waiver of the right to counsel.

A. The *McIntyre* Test

The New York Court of Appeals first articulated the limits on the state’s explicit constitutional right to self-representation in *People v. McIntyre*.¹⁴³ In *McIntyre*, the trial court denied the defendant’s pro se application after he made a rude outburst during the court’s general inquiry.¹⁴⁴ The Court of Appeals reversed his conviction, finding the outburst insufficient to warrant refusal of the right to self-representation, but also acknowledging that until *McIntyre* there had

¹⁴⁰ *Id.* at 177-78.

¹⁴¹ See *supra* note 99 and accompanying text. Similarly, the discussion of self-representation restrictions in New York will be limited to those that involve mental competency. New York also recognizes the limitations discussed in note 99, as seen in the *McIntyre* test (*infra* Part V.A), but they do not warrant further analysis in the context of this note.

¹⁴² See discussion *supra* Part IV.

¹⁴³ 324 N.E.2d 322 (N.Y. 1974).

¹⁴⁴ At one point during the court’s questioning of the defendant, the defendant yelled “F*** the jury. I’m not going to trial.” (Whereupon the defendant jumped up, knocked the chair over.)” *Id.* at 325. The court thereafter denied the defendant’s pro se request based on this outburst, the court’s conversation with him, and the defendant’s previous assertion that he believed assigned counsel to be perfectly competent. *Id.*

been no clearly defined boundaries surrounding the right.¹⁴⁵ In its discussion, the Court of Appeals described the competing interests involved in the right to self-representation: on the one hand is the cultural ideal that a person has the right to “determine his own destiny,” and on the other hand is the countervailing, “yet equally powerful ideal” that the courts should ensure a fair trial that determines the actual truth of criminal charges.¹⁴⁶ In light of these concerns, the Court of Appeals stressed its reluctance to allow the continued existence of the right to self-representation without reasonable limitations.¹⁴⁷

Consequently, the Court of Appeals created a three-pronged test for determining whether a criminal defendant may invoke his right to represent himself. First, the pro se request must be “unequivocal and timely asserted.”¹⁴⁸ To be unequivocal, the request must be made “clearly and unconditionally,”¹⁴⁹ and to be timely, the request must be asserted before the start of trial absent “compelling circumstances.”¹⁵⁰ Second, the defendant must knowingly and intelligently waive his right to counsel.¹⁵¹ In determining whether a waiver is effective, courts should consider the defendant’s personal background, such as “age, education, occupation and previous exposure to legal procedures,” but ignorance of the law is not alone sufficient to deprive a defendant of his right to self-representation.¹⁵² Third, the defendant cannot have “engaged in conduct which would prevent the fair and orderly exposition of the issues.”¹⁵³ A defendant’s right to self-representation is thus forfeited if he engages in disruptive conduct intended to undermine or delay the proceedings.¹⁵⁴ Although not articulated in *McIntyre*, the Court of Appeals has identified a fourth prerequisite to self-representation that the defendant be competent to stand trial.¹⁵⁵ Competency to stand trial is a rebuttable presumption, however, so the burden to make an inquiry arises only if

¹⁴⁵ *McIntyre*, 324 N.E.2d at 326, 328.

¹⁴⁶ *Id.* at 325.

¹⁴⁷ *Id.* at 326.

¹⁴⁸ *Id.* at 327.

¹⁴⁹ *Id.*

¹⁵⁰ *McIntyre*, 324 N.E.2d at 327.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 327-28.

¹⁵⁵ *Reason*, 334 N.E.2d at 574 (“[T]he right of a defendant to act as his own attorney . . . can only be premised on a prior determination that he has mental capacity to stand trial.”).

there is reason to question it.¹⁵⁶

B. Competency, Waiver, and “Searching Inquiry”

New York’s inquiry into valid waiver of counsel differs from the U.S. Supreme Court’s inquiry. In *Godinez*, the Supreme Court created a two-part inquiry into waiver: first, the defendant must be competent to waive his right to counsel, and second, the decision must be made knowingly and voluntarily.¹⁵⁷ In New York, however, the sole inquiry is whether the waiver is knowing and voluntary; the defendant’s competency, or “mental capability,”¹⁵⁸ in this context is just one of several factors that may be considered.¹⁵⁹ Similarly, New York does not require a separate inquiry into competency to proceed pro se, as federal law does. Despite New York’s lack of distinct competency inquiries into waiver of the right to counsel or proceeding pro se, competency *to stand trial* is a distinct prerequisite to the exercise of self-representation, as discussed further below.

1. Competency to Stand Trial

In New York, competency to stand trial, or “capacity,” is defined by statute, and a reasonable belief of incapacity compels judicial action; otherwise, sufficient capacity is presumed. Under New York Criminal Procedure Law section 730.30(1), if a court is “of the opinion that the [criminal] defendant is an incapacitated person,” then

¹⁵⁶ See discussion *infra* Part V.B.1.

¹⁵⁷ *Godinez*, 509 U.S. at 400, 401 n.12.

¹⁵⁸ *Reason*, 334 N.E.2d at 574. The language employed by the Court of Appeals is not always consistent, but it appears that “capacity” tends to refer to the statutory term defined in New York Criminal Procedure Law section 730.10, and it equates to the federal standard for “competency to stand trial.” The term “competency” in New York case law is often used interchangeably with “capacity,” but can probably be defined more broadly as “mental capability,” whereas “capacity” is used more frequently in the specific context of ability to stand trial. See, e.g., *Stone*, 6 N.E.3d at 574-76 (mentioning the federal due process requirement that a defendant be “competent to stand trial,” and referring to the same standard in New York as “mental capacity,” but also using the term “capacity” to describe a defendant’s “ability” to effect a knowing and voluntary waiver); *People v. Mendez*, 801 N.E.2d 382, 384 (N.Y. 2003) (referring to the statutory definition of “incapacitated person” as a “test for competence [to stand trial]”); *Reason*, 334 N.E.2d at 574 (discussing broadly the “standard[s] of competency” for standing trial and acting pro se, refusing to distinguish between “levels of mental capacity,” and noting that “mental capability” should be considered in determining a valid waiver).

¹⁵⁹ *Reason*, 334 N.E.2d at 574.

it “must issue an order of examination.”¹⁶⁰ An “incapacitated person” is defined as a “defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense[.]”¹⁶¹ and an “order of examination” is an “order . . . directing that [a criminal defendant] be examined for the purpose of determining if he is an incapacitated person.”¹⁶² Thus, a New York court has the statutory obligation to examine a defendant’s competency only if it has reason to believe that he is unable to comprehend the matters involved.¹⁶³ A defendant is presumed to be competent, and a mere history of mental illness is not enough to rebut that presumption.¹⁶⁴ The decision to order such an examination “lies within the sound discretion of the trial court.”¹⁶⁵ If, pursuant to an examination order, the psychiatric examiners come to a unanimous opinion regarding the defendant’s capacity, then the trial court *may* conduct a hearing sua sponte on the issue of capacity, but it *must* conduct a hearing upon request of the defendant or prosecutor.¹⁶⁶ If, however, the examiners are *not* unanimous in their opinion, then the court *must* conduct a capacity hearing sua sponte.¹⁶⁷ This statutory definition for “capacity” serves as the New York State equivalent of the U.S. Supreme Court’s “competency to stand trial” standard provided in *Dusky*.

2. Waiver and “Searching Inquiry”

The Court of Appeals has further established that trial courts must conduct a “searching inquiry” into the second prong of the *McIntyre* test (valid waiver of the right to counsel), or else the waiver will be “deemed ineffective.”¹⁶⁸ This requirement was first articulated in *People v. Reason*, when the Court of Appeals considered

¹⁶⁰ N.Y. CRIM. PROC. LAW § 730.30(1) (McKinney 2011).

¹⁶¹ *Id.* at § 730.10(1).

¹⁶² *Id.* at § 730.10(2).

¹⁶³ *People v. Morgan*, 662 N.E.2d 260, 261 (N.Y. 1995).

¹⁶⁴ *People v. Gelikkaya*, 643 N.E.2d 517, 519 (N.Y. 1994); *see also* *People v. Tafari*, 891 N.Y.S.2d 711, 713 (App. Div. 3d Dep’t 2009) (reversing the trial court’s denial of self-representation right, which was based solely upon defendant’s mental illness and court’s belief that defendant’s medication “affected [his] ability to understand the proceedings”).

¹⁶⁵ *Morgan*, 662 N.E.2d at 261.

¹⁶⁶ N.Y. CRIM. PROC. LAW § 730.30(2) & (3) (McKinney 2011).

¹⁶⁷ *Id.* at § 730.30(4).

¹⁶⁸ *People v. Smith*, 705 N.E.2d 1205, 1207-08 (N.Y. 1998); *see also* *People v. Sawyer*, 438 N.E.2d 1133, 1138 (N.Y. 1982); *Reason*, 334 N.E.2d at 575.

whether a trial court must order an examination of a defendant's competency to waive his right to counsel and defend himself if the court has already examined the defendant's competency to stand trial.¹⁶⁹ The *Reason* court prefaced its discussion by "reject[ing] the [defendant's] contention that there are two separate and distinct levels of mental capacity—one to stand trial, another to waive the right to be represented by counsel and to act as one's own attorney."¹⁷⁰ The court explained that the standard for competency to stand trial originated at a time when self-representation was commonplace; it would thus be foolish to suggest that a standard "designed to determine whether a defendant was capable of defending himself, is inadequate when he chooses to conduct his own defense."¹⁷¹ Further, application of a heightened standard would likely infringe on the constitutional right to self-representation.¹⁷²

While the *Reason* court declined to draw a bright line between levels of capacity, it insisted that a defendant's mental capability is still important when considering the validity of a waiver.¹⁷³ Unlike federal law—which requires a two-part inquiry into the validity of a waiver, when mental competency is evaluated independently from the knowing/voluntary inquiry¹⁷⁴—New York courts merely consider mental competency as a *factor* in assessing the sole inquiry of whether the waiver was knowing/voluntary and thus legally valid.¹⁷⁵ The record in *Reason* showed that the trial court had conducted an exami-

¹⁶⁹ In *Reason*, the defendant was charged and indicted for murder and attempted murder for stabbing two men. 334 N.E.2d at 573. After his arraignment, the court ordered an examination of the defendant's capacity to stand trial, and he was found competent to proceed. *Id.* The defendant requested to proceed *pro se* prior to his trial, and he resisted the court's strong urges to allow counsel to represent him. *Id.* The court allowed him to represent himself, and the trial concluded with a conviction. *Id.* Although the defendant exhibited unusual behavior during trial, such as "drift[ing] into irrelevant and nearly incoherent discourses," he firmly insisted that he was not mentally incapacitated and refused to present an insanity defense. *Id.* Following his trial, the court ordered another examination of the defendant's mental capacity to proceed with sentencing. *Reason*, 334 N.E.2d at 573. The examining psychiatrists determined, and the court agreed, that the defendant understood the proceedings against him and could assist in his own defense. *Id.* On appeal, since the defendant had denied the issue of mental incapacity, he argued that he was denied his constitutional right to counsel because he was not sufficiently competent to represent himself. *Id.* The Appellate Division affirmed the conviction, and the defendant appealed further to the Court of Appeals. *Id.*

¹⁷⁰ *Id.* at 574.

¹⁷¹ *Reason*, 334 N.E.2d at 574.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Godinez*, 509 U.S. at 400, 401 n.12.

¹⁷⁵ *Stone*, 6 N.E.3d at 576; *Reason*, 334 N.E.2d at 574.

nation of the defendant's competence to stand trial, repeatedly discussed with the defendant the dangers involved with self-representation, and ultimately determined from these interactions that he had waived his right "knowingly and intelligently with full awareness of the risks and consequences."¹⁷⁶ The Court of Appeals believed that the trial court, having considered the defendant's mental competency and whether he understood the dangers involved, made a sufficient searching inquiry into the *McIntyre* prong requiring a knowing and voluntary waiver of the right to counsel; a separate mental examination was not necessary.¹⁷⁷

Just as the Supreme Court requires when ensuring a valid waiver of counsel,¹⁷⁸ New York's searching inquiry of a defendant must ensure that he understands his rights and warns him of the risks and dangers of proceeding pro se.¹⁷⁹ In reaching this goal, a trial court should engage in a discussion with the defendant about his "age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver."¹⁸⁰ This list of factors is not all-inclusive; the Court of Appeals has "eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry."¹⁸¹ A waiver of the right to counsel will not be deemed ineffective simply for failing to question the defendant about each and every one of these factors.¹⁸² Still, the trial court's dialogue with the defendant should adequately warn him of the inherent perils of self-representation, as well as the "singular importance of the lawyer in the adversarial system of adjudication," to ensure he is making an informed decision.¹⁸³ An inquiry is not sufficiently "searching" where the court merely (1) repeatedly insists that the defendant continue with assigned counsel;¹⁸⁴

¹⁷⁶ *Reason*, 334 N.E.2d at 575.

¹⁷⁷ *Id.* at 575-76.

¹⁷⁸ *Faretta*, 422 U.S. at 835 ("[A defendant] should be made aware of the dangers and disadvantages of self-representation."); *Brady*, 397 U.S. at 748 ("Waivers of constitutional rights [must be] done with sufficient awareness of the relevant circumstances and likely consequences.");

¹⁷⁹ *Arroyo*, 772 N.E.2d at 1156; *People v. Slaughter*, 583 N.E.2d 919, 923 (N.Y. 1991); *Smith*, 705 N.E.2d at 1208; *Sawyer*, 438 N.E.2d at 1138; *Reason*, 334 N.E.2d at 575.

¹⁸⁰ *Smith*, 705 N.E.2d at 1208; *see also McIntyre*, 324 N.E.2d at 327.

¹⁸¹ *People v. Providence*, 813 N.E.2d 632, 635 (N.Y. 2004); *Arroyo*, 772 N.E.2d at 1156; *see also Smith*, 705 N.E.2d at 1208.

¹⁸² *Providence*, 813 N.E.2d at 635.

¹⁸³ *Smith*, 705 N.E.2d at 1208.

¹⁸⁴ *Id.*

(2) informs the defendant that it is not in his best interest to proceed without counsel;¹⁸⁵ (3) reassures the defendant that he will have standby counsel as an advisor;¹⁸⁶ (4) leaves the defendant with no choice but to represent himself after refusing to cooperate with or accept assigned counsel;¹⁸⁷ or (5) assumes a valid waiver based on the defendant's apparent sensibility.¹⁸⁸

VI. "HAUNTED TRIALS"¹⁸⁹—INCONSISTENT STANDARDS OF COMPETENCY

In a broad sense, the competency limitations on the right to self-representation in New York are not entirely dissimilar to those imposed by the U.S. Supreme Court. Both New York and federal courts recognize the important but competing rights to assistance of counsel versus self-representation, as well as their respective interests in securing a fair defense versus encouraging individual autonomy. Both have delineated reasonable restrictions on the right to self-representation in an effort to keep it in harmony with the right to counsel. Furthermore, both have emphasized the basic due process requirements that a defendant be competent to stand trial and that he effect a valid waiver before disposing of a constitutional right. Where New York and federal courts diverge, however, is in their application of the competency requirements and articulation of standards for them.

The U.S. Supreme Court conditions the exercise of self-representation, in part, on the defendant's competency to (1) stand

¹⁸⁵ *Sawyer*, 438 N.E.2d at 1138 (describing the trial court's inquiry as "woefully inadequate" when it refused to assign defendant new counsel upon request and informed defendant that his only alternative was to represent himself, but advised that self-representation was not in his "best interests").

¹⁸⁶ *Slaughter*, 583 N.E.2d at 922-23 (finding inquiry insufficient where trial court informed defendant, in response to a request for new counsel, that "if he no longer wanted to be represented by his assigned counsel, then he could represent himself," and explained that he would not receive assistance from the court, but his original assigned counsel would remain available as an advisor).

¹⁸⁷ See *supra* notes 185-86.

¹⁸⁸ *Arroyo*, 772 N.E.2d at 1156 (ruling that no valid waiver was effected where trial court sweepingly concluded that "there was no need to ask defendant any questions to know that he was 'sensible to some extent'").

¹⁸⁹ *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting) ("[Many of the] procedural problems spawned by [the right to self-representation], such as the standards of waiver and the treatment of the pro se defendant, will *haunt the trial* of every defendant who elects to exercise his right to self-representation.") (emphasis added).

trial, (2) waive the right to counsel, and (3) proceed pro se. The first two conditions can both be satisfied by the minimum competency standard articulated in *Dusky*, but trial courts have the discretion to require a heightened standard for the third condition if the defendant is mentally ill. Unfortunately, the Supreme Court has not provided much guidance for trial courts to apply these standards. It is also difficult to rationalize the distinction the Court drew in both *Godinez* and *Edwards* between choosing to proceed pro se (i.e., waiving the right to counsel) and proceeding pro se. As Justice Blackmun observed in his *Godinez* dissent:

It is obvious that a defendant who waives counsel must represent himself. . . . And a defendant who is utterly incapable of conducting his own defense cannot be considered “competent” to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered “competent” to make such a choice.¹⁹⁰

Thus, the distinction between *choosing* to proceed pro se and *proceeding* pro se is an artificial one, since a defendant is unlikely to accomplish one without the other. Although the Court claimed a difference between the *Edwards* defendant representing himself to conduct his own trial, and the *Godinez* defendant representing himself “only to change his pleas to guilty,”¹⁹¹ both defendants ultimately conducted their own defenses. The Court made an unjustified and arbitrary distinction by suggesting that different competency standards may apply depending on the nature of the self-representation.

This distinction is particularly troublesome in light of the Court’s arguments in *Godinez* and *Edwards*, in support of the standards for waiving counsel and proceeding pro se, respectively. In *Godinez*, the Court explicitly rejected the view that waiver of the right to counsel requires a higher level of mental functioning than that required to stand trial. Yet the Court proffered that there may be a different competency standard to represent oneself, as distinguished from the standard to *choose* to represent oneself. Indeed, in *Edwards*, the Court found that the standard of competency to represent oneself may be higher than the standard of competency to choose self-representation when the defendant is mentally ill, reasoning that men-

¹⁹⁰ *Godinez*, 509 U.S. at 416 (Blackmun, J., dissenting).

¹⁹¹ *Edwards*, 554 U.S. at 173.

tal illness can vary in degree and manifest itself in different ways. But if these two standards may differ on this basis, then by the same logic—and contrary to the Court’s holding in *Godinez*—there is no reason that the standard for competency to stand trial cannot also differ from that required to waive counsel.

New York’s approach is far more workable. The New York Court of Appeals has repeatedly declined to recognize differing standards of competency to complete various trial-related tasks. It has reasoned that while there is no need to create separate inquiries into types of competency with different standards, mental competency is still highly relevant when determining a valid waiver. Thus, the Supreme Court’s jump in logic—between *Godinez*, where it found no reason to require different competency standards for standing trial and waiving the right to counsel, and *Edwards*, where it held that mental illness *can* warrant different competency standards for waiving the right to counsel and proceeding pro se—is not a concern in New York. Likewise, by treating waiver of the right to counsel and self-representation as cooperative and interdependent, New York avoids the conundrum created by the Supreme Court’s refusal to do the same. In fact, the Court of Appeals has characterized waiver of counsel as a right that is “implicit [and] concomitant” in the right to self-representation.¹⁹²

VII. *PEOPLE V. STONE* REVISITED

Consistent with its own precedent, the Court of Appeals in *People v. Stone* correctly decided the issue of whether the trial court was required to sua sponte order a competency hearing to assess Stone’s ability to conduct his own defense. While Stone insisted that *Edwards* created a new rule in self-representation cases that trial courts must evaluate a defendant’s competency to proceed pro se, the Court of Appeals appropriately rejected this argument on the basis that New York has never required this as a separate and independent inquiry. This is also consistent with federal law, since the *Edwards* Court specifically held that trial courts *may* deny mentally ill defendants the right to self-representation, which does not mean they are *required* to, as Stone alleged. With respect to Stone’s alternate argument, that *Edwards* created a baseline competency standard to stand

¹⁹² *Sawyer*, 438 N.E.2d at 1138.

trial and a heightened standard to proceed pro se, the Court of Appeals properly rejected this distinction pursuant to New York law, which does not recognize separate competency standards whatsoever. Although the Court of Appeals did not acknowledge the differing approaches employed by federal and New York courts with respect to competency standards, it did note that its view was *not inconsistent* with the federal view. Again, the *Edwards* Court merely held that trial courts *may* impose a heightened competency standard when a mentally ill defendant seeks to represent himself, but they need not do so. Indeed, New York has chosen not to, and this is constitutionally adequate.

VIII. CONCLUSION

The constitutional right to self-representation implicates conflicting interests that must be properly balanced, so courts have responded by reasonably limiting the exercise of this right. Stemming from the longstanding due process requirement that a defendant be mentally competent to stand trial, the Supreme Court has additionally required that a defendant be mentally competent to waive his right to counsel and conduct his own defense before he can exercise his right to self-representation. Regrettably, the federal decisions that articulated these standards of competency are often inconsistent with one another. New York, by contrast, has prevented such confusion by refusing to create additional inquiries into mental competency beyond competency to stand trial. Instead, New York considers a defendant's mental capabilities when determining whether he validly waived his right to counsel and can thus proceed on his own. Overall, New York's approach is more logical and practical, as it avoids so many of the variables that the Supreme Court has created.

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